NO. 05-18-00098-CR

In the Court of Appeals
For the Fifth District
Dallas, Texas

JAMES BERKELEY HARBIN II,
APPELLANT,

V.

THE STATE OF TEXAS,
APPELLEE.

On Appeal from the 204th Judicial District Court of
Dallas County, Texas
In Cause No. F91-22107-Q

STATE'S MOTION FOR REHEARING

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TO THE HONORABLE COURT OF APPEALS:

The State respectfully submits its Motion for Rehearing.

POINT ON REHEARING

This Court erred by determining that the trial court erred in refusing to include a sudden-passion instruction in the jury charge at Appellant's 2017 retrial on punishment for a murder he committed in 1990 because the savings provision in the 1993 Act amending the penal code provides that it was not the law applicable to the case.

ARGUMENT AND AUTHORITIES

This Court reversed the trial court's judgment in Appellant's 2017 retrial on punishment and remanded the case for another punishment trial because it determined the trial court erred in refusing to include a sudden-passion mitigation instruction in the jury charge which caused Appellant to suffer some harm. *Harbin v. State*, No. 05-18-00098-CR, 2019 WL 5884404, at *5, 7 (Tex. App.—Dallas Nov. 12, 2019, no pet. h.) (mem. op., not designated for publication). The Court determined that the 1994 amendment to the penal code making sudden-passion a mitigation issue at punishment was a procedural, not substantive, change in the law, which controlled at Appellant's 2017 punishment retrial. *Id.* at *5.

Although neither Appellant nor the State raised the argument in their briefs on direct appeal, under the savings provision applicable to the 1994 amendment

to section 19.02 of the penal code, sudden-passion was not the law applicable to the case, regardless of whether the change in the law was procedural or substantive.

The savings provision

The 1993 act amending the penal code (the 1993 Act) concluded with a "savings provision" that reads:

> (a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before the effective date.
>
> (b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.18, 1993 Tex. Gen. Laws 3586, 3705. Section 1.19 of the savings provision reads as follows:

> (a) Except as provided by Subsection (b) of this section, this article takes effect on September 1, 1994.
>
> (b) The repeal of Section 12.422, Penal Code, as provided by Section 1.01 of this article, Section 16.02(b)j), Penal Code, as added by Section 1.01 of this article, and Sections 1.02, 1.06, and 1.16 of this article take effect September 1, 1998.

Id. § 1.19. A reading of the two sections together clearly demonstrates that the new code took effect on September 1, 1994, with the exception of a few provisions

that are not pertinent here. The words are clear: the changes apply "only to offense[s] committed on or after" September 1, 1994. By including the savings provision clause at the conclusion of the 1993 Act amending the penal code, the Legislature expressed its clear intention that the former law would remain in effect to govern the disposition of cases involving offenses committed prior to September 1, 1994, the effective date of the amended code. This Court cannot ignore the Legislature's explicit intent. *See Garcia v. State,* 829 S.W.2d 796, 799–800 (Tex. Crim. App. 1992) (stating that courts are bound to "effectuate the legislative intent evidenced by the plain language of statutes"). Hence, Appellant's punishment for his 1990 act in killing his father, which was a criminal act committed prior to September 1, 1994, remained subject to the punishment scheme in the old code.

Savings provision caselaw

Texas caselaw also demonstrates that the savings provision in the 1993 Act made the law in effect in 1990 the law applicable to the case. For example, in *Pesch v. State*, the appellant committed two murders in 1973 before the penal code was revised in 1974. 524 S.W.2d 299, 300 (Tex. Crim. App. 1975). At his trial in 1974, and after the new code took effect, the appellant requested an affirmative defense of insanity as it was defined in the new code. *Id.* The appellant argued that the jury could make a finding of insanity under the new code, but under the old code, which applied the McNaughton Rule, it could not. *Id.* He contended on appeal that the trial court erred in refusing his insanity instruction pursuant to the new code. *Id.* The Court of Criminal Appeals disagreed, however, and determined that

under the savings provisions of the 1973 Act, which provided that criminal actions were governed by the law existing at the time of the commission of the act, the trial court did not err in submitting the issue of insanity to the jury under the law as it existed at the time the appellant committed the offense. *Id.* at 301; *see also Brady v. State*, 906 S.W.2d 268, 270 (Tex. App.—Amarillo 1995, pet. ref'd) (holding that, under the savings provisions of the 1993 Act, the appellant was not entitled to the punishment scheme under the new code where he committed the offense prior to the effective date of the code).

Here, Appellant committed the murder in 1990, and the explicit terms of the savings provision in the 1993 Act, which was similar to the savings provision in *Pesch*, provide that the law at the time of the commission of the offense applies. *See Pesch,* 524 S.W.2d at 301; Act of May 29, 1993, §§ 1.18-1.19. This Court erred by finding that the law as it stood in 1994 was the law applicable to the case.

Due process

This Court also determined that due process and equity in relation to the State's *Brady* violations required the trial court to instruct the jury on sudden-passion. *Harbin*, 2019 WL 5884404, at *6. The Court of Criminal Appeals did not grant Appellant a new trial on guilt-innocence, and his murder conviction stands. The appropriate time and place for presenting sudden-passion evidence under the law in 1990 was at guilt-innocence, where Appellant could have requested a voluntary manslaughter charge. *See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 19.03(a), 1973 Tex. Gen. Laws 883, 913, amended by Act of May 28, 1973, 63d Leg., R.S., ch. 426, § 1, sec. 19.04(a), 1973 Tex. Gen Laws 1122, 1124, *repealed*

by Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3614.

Despite this Court's misgivings about justice and equity, justice was served. The Court of Criminal Appeals granted Appellant the relief he requested in his writ of habeas corpus proceeding — a new punishment hearing. The relief granted is the relief that applies, and Appellant indeed had a new punishment hearing. At the hearing, he presented his mitigation evidence to the jury, the jury vacated his life sentence and sentenced him to twenty-four years' confinement — what it believed was time served.

Moreover, no constitutional right exists to a sudden-passion mitigation instruction, and Appellant's constitutional rights were not violated by the absence of such an instruction in the charge. In an analogous death-penalty case, *Buntion v. State*, the Court of Criminal Appeals granted the appellant a new trial on punishment on writ of habeas corpus. 482 S.W.3d 58, 105 (Tex. Crim. App. 2016). At his punishment retrial in 2011, the appellant, who was convicted of capital murder in 1990, requested that the trial court apply the punishment law in effect at the time of his 2011 punishment hearing, which included life without parole as a sentencing option. *Id.* The Court determined that the trial court did not err in refusing to apply a punishment provision that was not available to an offense committed in 1990, and that applying the version of the sentencing scheme that was in effect at the time the appellant committed the offense did not render his sentence unconstitutional. *Id.*

Likewise, in this case, at the time Appellant committed the murder in 1990, no sudden-passion mitigation statute was available in the punishment scheme. A determination that due process demanded Appellant receive one in his 2017 retrial on punishment, where the applicable law did not provide for one, is irrational and erroneous. *See id.* Appellant was afforded due process by receiving a new punishment hearing where he had the opportunity to present his mitigating punishment evidence, and, tellingly, the jury reduced his life sentence to what it believed was time served. The sentence assessed belies any concerns that this Court has that a jury did not have the opportunity to properly entertain the mitigation punishment evidence that was absent from his first trial.

Conclusion

The Court did not apply the correct law to its analysis of the issue on appeal and incorrectly based its decision on an irrelevant argument. Regardless of whether the change in the law in 1994 was procedural or substantive, the savings clause in the 1993 Act clearly indicates that the law applicable to the case was the law as it stood in 1990 when Appellant committed the offense. No due process concerns are present. Hence, this Court erred in determining that the trial court erred by refusing to include a sudden-passion mitigation instruction in the charge and finding that Appellant was harmed.

Prayer

The State prays that this Honorable Court grant this motion for rehearing, withdraw its opinion, and, after reconsideration, affirm the trial court's judgment.

Respectfully submitted,

/s/ *Marisa Elmore*

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Certificate of Compliance

I certify that this document contains 1,470 words, according to Microsoft Word 2016, exclusive of the sections excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Marisa Elmore*
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Certificate of Service

I certify that I served a true copy of the foregoing brief on Lawrence B. Mitchell, attorney for Appellant, by electronic service to judge.mitchell@gmail.com, on November 25, 2019.

/s/ *Marisa Elmore*
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